

SUPREME COURT PENDING CASES

The following appeals are fully briefed and eligible for assignment by the Supreme Court in the near future.

ROGER SAUNDERS *v.* CLARK BRINER et al., SC 19940

Judicial District of Waterbury

Limited Liability Companies; Whether Member of LLC has Standing to Bring Derivative Claims on Behalf of LLC; Whether Trial Court Properly Declined to Apportion Attorney's Fees under CUTPA Between CUTPA and Non-CUTPA Claims; Whether Trial Court Properly Declined to Reimburse Plaintiff for Fiduciary Related Expert Fees. The plaintiff formed a business venture with the defendant Clark Briner to make high interest/high yield loans secured by mortgages to financially distressed real estate owners. Their partnership resulted in the formation of three jointly controlled entities – Revere Investments, LLC; Revere High Yield Debt Fund, LP; and Revere High Yield Debt Fund GP, LLC. The parties' relationship disintegrated, and they ceased operation of the jointly controlled entities. Saunders brought this action against Briner and two of his limited liability companies (the Briner defendants), alleging breach of contract, breach of the implied covenant of good faith and fair dealing, violation of the Connecticut Unfair Trade Practices Act (CUTPA), and breach of fiduciary duty. The plaintiff brought the claims both directly and derivatively on behalf of the jointly controlled entities. The matter was tried to the court, which found in favor of the plaintiff as to his direct claims of breach of the implied covenant of good faith and fair dealing and breach of fiduciary duty. The trial court also found in favor of the plaintiff as to his derivative claims of breach of contract, violation of CUTPA, and breach of fiduciary duty on behalf of Revere Investments. The trial court awarded the plaintiff damages and attorney's fees under CUTPA, but denied his request for reimbursement of tax and accounting expert fees arising from the work of the court-appointed fiduciary. The Briner defendants appeal and the plaintiff cross appeals from the trial court's judgment. The Supreme Court will decide in the defendants' appeal whether the plaintiff lacked standing to bring his claims. They argue as to the derivative claims that, at all relevant times, Connecticut law did not authorize a member of a limited liability company to bring a derivative action on its behalf. They further argue as to the direct claims that the plaintiff's limited liability company, Saunders Capital, LLC, made the investments at issue and that it, not

the plaintiff, was the party with standing to bring the claims. The Supreme Court will also decide whether the trial court abused its discretion in considering the opinion testimony of an accountant called by the plaintiff as a witness where the defendants argue that the plaintiff did not properly disclose the accountant as an expert witness. Finally, the Supreme Court will decide in the defendants' appeal whether the trial court properly declined to apportion its award of attorney's fees under CUTPA between the time spent on the plaintiff's CUTPA claims and the time spent on his non-CUTPA claims. The Supreme Court will decide in the plaintiff's cross appeal whether the trial court properly declined to order that the plaintiff be reimbursed for the tax and accounting expert fees arising from the work of the court-appointed fiduciary.

KARL MAYER-WITTMAN, EXECUTOR (ESTATE OF GERDA
MAYER-WITTMAN) *v.* ZONING BOARD OF APPEALS
OF THE CITY OF STAMFORD et al., SC 19972

Judicial District of Stamford-Norwalk

Zoning; Variances; Whether Defendant Proved Unusual Hardship; Whether Variances Reduced Legal Nonconformities; Whether Zoning Regulations Barred Reconstruction Started More Than Twelve Months After Damage Sustained. The defendant Paul Breunich owns property in the city of Stamford that is improved with a primary residence and multiple accessory structures, including a cottage. The cottage does not comply with the city's zoning regulations, as it is located within the rear and side yard setbacks on the property and it exceeds the height limitation for accessory structures. The cottage, however, is considered a legally nonconforming accessory structure because it predates the adoption of the city's zoning regulations. In 2012, the cottage was rendered uninhabitable as a result of damage sustained during Hurricane Sandy. Breunich sought to rebuild the cottage so that it is in compliance with new local and FEMA flood regulations. In order to do so, he requested variances so that he could construct the cottage an additional nine feet higher and three feet further into the rear yard setback where the soil is stable enough to support the pylons to raise the structure. The city's zoning board of appeals granted the variances, and the plaintiff, an adjoining property owner, appealed from that decision to the trial court. The trial court dismissed the appeal, ruling that the board did

not act unreasonably, arbitrarily or in abuse of its discretion in granting the variances. Specifically, the trial court determined that there was substantial evidence in the record to support the board's finding that an unusual hardship exists because it would be impossible for the defendant to comply with both the minimum elevation requirements of the flood regulations and the height and setback requirements of the zoning regulations. The trial court further determined that the granting of the variances was proper on the alternative ground that it reduced the nonconforming use by bringing the cottage into compliance with the flood regulations. The plaintiff appeals, claiming that trial court improperly found that the defendant had proven a hardship justifying the variances where the hardship is not unique to his property but, rather, generally affects property owners on the Stamford coastline and where the defendant would still have a reasonable use for his property without the variances. The plaintiff further argues that the variances increased, rather than reduced, the nonconformities and that the trial court applied the wrong legal standard in determining whether the variances were the minimum relief necessary. The plaintiff also argues that the defendant is barred from rebuilding the cottage by the city's zoning regulations, which require the owner of a nonconforming structure to start reconstruction within twelve months of the date that it sustained the damage.

ROCKSTONE CAPITAL, LLC *v.* JOHN SANZO et al., SC 20041

Judicial District of Fairfield

Foreclosure; Appellate Jurisdiction; Whether Appellate Court Properly Concluded That Appeal and Cross Appeal Taken From Final Judgment; Whether Mortgage Containing Waiver of Statutory Homestead Exemption Void as Against Public Policy.

After the plaintiff brought this action seeking to foreclose its judgment liens on the defendants' primary residence, the parties entered into a forbearance agreement, which provided that a mortgage would be placed on the property to secure the defendants' obligation under the agreement. The mortgage included a waiver by the defendants of the homestead exemption set forth in General Statutes § 52-352b (t). That statute provides that a homestead is exempt from the enforcement of a money judgment up to the value of \$75,000, less the amount of any consensual lien. After the defendants defaulted on their payments, the plaintiff amended its complaint to seek foreclosure of the mortgage instead of the judgment liens. The trial court ruled that the defendants' waiver of the homestead exemption and the forbearance agreement were void as against public policy and, consequently, that the plaintiff

could not foreclose on the mortgage. Instead, the court rendered judgment for the plaintiff on the judgment liens, but that judgment did not specify the method of foreclosure and it made no finding as to the amount of the debt. The plaintiff appealed, claiming that the court improperly denied the foreclosure of its mortgage, and the defendants cross appealed claiming that the court improperly rendered a judgment of foreclosure on the judgment liens. As an initial matter, the Appellate Court (175 Conn. App. 770) determined that it had jurisdiction over the appeal and cross appeal. Specifically, it concluded that the denial of the plaintiff's request for foreclosure of the mortgage constituted an appealable final judgment because the order denied the relief requested in the operative complaint. The court also concluded that, while a foreclosure judgment that does not specify the method of foreclosure and the amount of the debt ordinarily does not constitute an appealable final judgment, it nevertheless had jurisdiction over the cross appeal because the claim raised therein was inextricably intertwined with the claim raised in the appeal. As to the merits of the appeal, the Appellate Court ruled that the trial court improperly denied the foreclosure of the mortgage. In so ruling, the court determined that the mortgage could not be declared void as against public policy based on the homestead exemption waiver when the plaintiff was not relying on the waiver and that the mortgage was exempt from the homestead exemption under § 52-352b (t) because it was a consensual lien. As to the merits of the defendants' cross appeal, the court ruled that the trial court improperly rendered a judgment of foreclosure on the judgment liens when the plaintiff had amended its complaint to seek foreclose solely of the mortgage. The defendants appeal, and the Supreme Court will decide whether the Appellate Court properly concluded that the appeal and cross appeal were taken from a final judgment and, if so, whether it properly concluded that the mortgage encumbering the same property and the same debt as the judgment liens was a consensual lien, and not a de facto waiver of the statutory homestead exemption that was void as against public policy.

U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE
v. ROBIN BLOWERS et al., SC 20067
Judicial District of Hartford

Foreclosure; Whether Appellate Court Properly Affirmed Judgment Striking Defendants' Special Defenses and Counterclaims on Ground that Defenses and Counterclaims did not Relate to the Making, Validity or Enforcement of Note or Mortgage. The plaintiff brought this action seeking to foreclose a mortgage

on property in Avon. The parties subsequently participated in a foreclosure mediation program but were unable to reach an agreement. The defendants then filed three special defenses and three counterclaims, claiming that, during the foreclosure mediation, the plaintiff hindered their ability to obtain a binding loan modification and that, in the mediation, the plaintiff and its loan servicer failed to conduct themselves in a manner that was fair, equitable and honest. The special defenses sounded in equitable estoppel, unjust enrichment and unclean hands, and the counterclaims sounded in negligence, violation of the Connecticut Unfair Trade Practices Act and unjust enrichment. The trial court granted the plaintiff's motion to strike the special defenses and counterclaims and rendered a judgment of strict foreclosure. Defendant Mitchell Piper appealed, claiming the trial court wrongly struck the special defenses and counterclaims. The Appellate Court (177 Conn. App. 622) affirmed the trial court's judgment. The Supreme Court granted Piper certification to appeal, and it will consider the following issues: (1) Did the Appellate Court properly hold that both special defenses and counterclaims to a foreclosure action must "directly attack" the making, validity or enforcement of the note or mortgage? (2) Did the Appellate Court properly hold that alleged post-origination misconduct concerns a plaintiff's "enforcement" of a note or mortgage only if the plaintiff breaches a loan modification or other similar agreement that affects the enforceability of the note or mortgage? (3) Did the Appellate Court properly hold that the defendants' allegations of the plaintiff's misconduct did not amount to an allegation that the plaintiff had agreed to a "final, binding loan modification" that affected the plaintiff's ability to enforce the note or mortgage?

NETSCOUT SYSTEMS, INC. v. GARTNER, INC., SC 20079

Judicial District of Stamford-Norwalk

Defamation; First Amendment; Whether Defendant's Report Evaluating Plaintiff's Business and Products was Commercial Speech; Whether Trial Court Properly Concluded that Plaintiff a Limited Purpose Public Figure. The plaintiff provides information technology products that allow companies to manage the performance of their computer networks. The defendant is an information technology firm offering consulting and research services, and it issued a research report comparing and ranking competing vendors, including the plaintiff, in the network management business. The plaintiff brought this action alleging defamation and a violation of CUTPA, claiming that the statements about its business in the report were false

and that they were issued in furtherance of a scheme whereby a vendor's ranking is influenced by the amount of fees it pays for consulting services. The defendant filed a motion for summary judgment, which the trial court granted. As to the defamation claim, the court found that the statements were entitled to heightened first amendment protection, requiring proof of "actual malice," because (1) the defendant's speech is not commercial speech, (2) the plaintiff is a "limited purpose public figure," and (3) the speech at issue relates to matters of public concern. The court explained, as to its "limited purpose public figure" finding, that the plaintiff (1) successfully invited public attention to its views in an effort to influence others prior to the issuance of the report, (2) voluntarily injected itself into a public controversy over the relative rankings of its products, (3) assumed a position of prominence in the controversy, and (4) maintained regular access to the media. The court went on to conclude that the plaintiff failed to prove that the statements were made with actual malice. The court also granted summary judgment as to the CUTPA claim. The plaintiff now appeals. Specifically as to the court's finding that it was a "limited purpose public figure," the plaintiff contends that the topic of rankings among companies in the marketplace cannot constitute a preexisting public controversy on which sizeable segments of society have different, strongly held views. Moreover, the plaintiff maintains that its ordinary marketing efforts to promote its business and products over those of its competitors did not transform it into a public figure. The plaintiff further contends that the defendant's speech is commercial speech because it is motivated by the desire for profit and, thus, unlikely to be chilled.

STATE *v.* WILLIAM McCLEESE, SC 20081

Judicial District of New Haven

Criminal; Juvenile Sentencing; Whether Availability of Parole Under Public Act Moots Constitutional Claims that Juvenile Offender Should be Resentenced Because Sentencing Court did not Consider Mitigating Factors of Youth; Whether Public Act Violates Equal Protection Rights of Juveniles Convicted of Murder. In 2003, the defendant was sentenced to eighty-five years of incarceration without eligibility for parole for murder and other crimes committed when he was seventeen years old. In *Miller v. Alabama*, 567 U.S. 460 (2012), the United States Supreme Court held that the eighth amendment to the federal constitution, which prohibits cruel and unusual punishment, forbids a trial court from sentencing a juve-

nile convicted of murder to mandatory life imprisonment without parole unless the court has considered youth related mitigating factors. In 2015, the defendant filed a motion to correct an illegal sentence, claiming that his sentence violated the eighth amendment as interpreted in *Miller* and article first, §§ 8 and 9, of the Connecticut constitution because the sentencing court did not consider youth related mitigating factors before imposing the functional equivalent of a life sentence without parole. Subsequently, the legislature enacted P.A. 15-84, § 1, later codified as General Statutes § 54-125a (f), which provides for parole eligibility for juvenile offenders who, like the defendant, are serving a sentence of greater than ten years of incarceration. Next, in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), the United States Supreme Court indicated that a *Miller* violation could be remedied by affording a juvenile offender parole eligibility, rather than resentencing. The trial court dismissed the motion to correct an illegal sentence as moot under *Montgomery* because the parole eligibility afforded to juvenile offenders by P.A. 15-84 was an adequate remedy for the constitutional violations claimed by the defendant. The defendant then filed this appeal. Subsequently, the Supreme Court held in *State v. Delgado*, 323 Conn. 801 (2016), that juvenile offenders can no longer make any colorable claim that their sentences are illegal under *Miller* because they are eligible for parole under P.A. 15-84. The defendant nonetheless claims that any juvenile who has been sentenced to the functional equivalent of a life sentence without parole is entitled to a *Miller* compliant resentencing hearing under the federal constitution and the Connecticut constitution, which he argues affords broader protections against cruel and unusual punishment. The defendant also claims that P.A. 15-84 violates the equal protection clauses of the federal and Connecticut constitutions. In making this claim, the defendant relies on P.A. 15-84, § 6, which provides that provisions of the capital felony statute, General Statutes § 53a-54, now apply only to individuals who were eighteen years of age or older at the time the offense was committed. The defendant argues that the practical effect of the amendment has been to invalidate the sentences of life without parole imposed upon juvenile offenders who were convicted of capital felonies and to provide them with *Miller* compliant resentencing hearings, even though similar relief has not been afforded to juvenile offenders like him who were convicted of the lesser offense of murder.

ANDREW CIMMINO *v.* MARIA MARCOCCIA et al., SC 20084

Judicial District of Fairfield at Bridgeport

Writ of Error; Attorney Discipline; Whether Appellate Court Properly Clarified its Prior Order Prohibiting Attorney From Representing Clients Before Appellate Court. In December, 2014, the Appellate Court ordered the plaintiff-in-error, attorney Josephine Smalls Miller, suspended from practicing law or representing clients before that court until it granted a motion for her reinstatement. The plaintiff-in-error challenged that order in a prior writ of error that was dismissed in *Miller v. Appellate Court*, 320 Conn. 759 (2016), after the Supreme Court concluded that the Appellate Court did not abuse its discretion in issuing the December, 2014 order. In 2017, the Office of the Chief Disciplinary Counsel sent a letter to the Appellate Court, reporting that the plaintiff-in-error might be in violation of the December, 2014 order. In response, the Appellate Court issued an order clarifying that its December, 2014 order precluded the plaintiff-in-error from providing legal services of any kind in connection with any Appellate Court matter until that court granted a motion for reinstatement, which it has not done. The plaintiff-in-error then filed this second writ of error, claiming that the Appellate Court erred by issuing the clarification order. She argues that the clarification order is, effectively, an ex post facto law that deprived her of her constitutional rights to due process and equal protection. She also asserts that the December, 2014 order as well as the clarification order interfere with her relationships with her clients, are the result of the selective enforcement of attorney disciplinary rules, and amount to racially disparate and retaliatory treatment. The plaintiff-in-error seeks, among other things, an order vacating the December, 2014 order and the clarification order. The defendant-in-error, the Appellate Court, argues that the doctrine of res judicata bars the plaintiff-in-error from claiming that the December, 2014 order was the result of the selective enforcement of attorney disciplinary rules or amounted to racially disparate and retaliatory treatment.

DONITA J. KING, INDIVIDUALLY AND AS EXECUTRIX
OF THE ESTATE OF DANIEL H. KING *v.*
VOLVO EXCAVATORS, AB, et al.,
SC 20097

Judicial District of New London

Product Liability; Whether Differing Statute of Repose in General Statutes § 52-577a for Those Entitled to Workers' Compensation Benefits Violates Constitutional Guarantee of Equal Protection. In 2014, Daniel King was fatally injured while working at a construction site when he was struck by a bucket that had detached from a Volvo excavator. In 2015, the executrix of King's estate brought this product liability action against the excavator's manufacturer, distributor and service provider. General Statutes § 52-577a (a), which is applicable to product liability claims, provides a statute of repose barring product liability actions brought later than ten years from "the date that the party last parted with possession or control of the product." Subsection (c) of § 52-577a, however, provides that this ten year limitation "shall not apply to any product liability claim by a claimant who is not entitled to [workers' compensation benefits], provided the claimant can prove that the harm occurred during the useful safe life of the product." The defendants moved for summary judgment, claiming that the action was time-barred because it was filed more than ten years after they parted with possession of the excavator. In opposition, the plaintiff claimed that § 52-577a (c) violated constitutional guarantees of equal protection by discriminating against employees entitled to workers' compensation in denying them the right to bring product liability actions more than ten years after the manufacturer relinquishes control of the product. The trial court rendered judgment for the defendants, finding that the defendants were not in possession or control of the excavator after November, 2001. In rejecting the plaintiff's constitutional claim, the trial court cited *Daily v. New Britain Machine Co.*, 200 Conn. 562 (1986), where the Supreme Court held that § 52-577a does not violate equal protection and that the distinction made by the legislature in that statute bore a rational relationship to the legitimate state goal of ameliorating a product liability crisis that arose in the 1970's stemming from the unavailability of adequate product liability insurance coverage for manufacturers. The trial court held that, while the legislature had amended § 52-577a effective October 1, 2017 to remove the "workers' compensation exclusion," it was nonetheless bound to follow *Daily*, and that it had no power to give retroactive effect to the new legislation. The plaintiff appeals, claiming that the disparate treatment of employees and non-

employees violates the right of equal protection and that *Daily* should be overruled. The plaintiff further contends that the trial court improperly found that the defendants did not have possession or control of the excavator after November, 2001.

TREMONT PUBLIC ADVISORS, LLC *v.* CONNECTICUT
RESOURCES RECOVERY AUTHORITY, SC 20119
Judicial District of Hartford

Antitrust; Whether Plaintiff Pleaded Legally Sufficient Claim of Violation of Connecticut Antitrust Act; Whether Plaintiff Alleged Facts that Would Establish an Actual Adverse Effect on Competition in the Relevant Market; Whether a Plaintiff must be an “Efficient Enforcer” of Antitrust Laws to have Standing to Sue Under Connecticut Antitrust Act. The defendant, a quasi-public agency providing waste disposal and recycling services to member municipalities, issued a request for bids for its three-year Municipal Government Liaison Services Contract (contract). In response to the defendant’s request, the plaintiff, a public relations firm, submitted a proposal in compliance with all of the stated requirements. The defendant did not award the contract for which it sought bids and, instead, awarded a ten-month contract to Brown Rudnick LLP, the only other company to submit a proposal. The plaintiff, as the losing bidder, brought this action claiming that the defendant violated the Connecticut Antitrust Act, General Statutes § 35-24 et seq., by conspiring with Brown Rudnick to conduct a sham bidding process for the contract. The trial court denied the defendant’s motion to dismiss, concluding that the plaintiff had standing to bring the action, but it granted the defendant’s motion to strike, concluding that the plaintiff failed to state a legally sufficient antitrust claim. In so ruling, the court rejected the claim that bid rigging between parties that are not competitors is per se anticompetitive and, therefore, not subject to the rule of reason analysis. The court explained that in order to establish a per se claim under the Antitrust Act based on allegations of bid rigging, the parties to the alleged agreement must have a horizontal relationship; that is, an agreement between competing bidders. Analyzing the complaint under the rule of reason, the court concluded that the plaintiff failed to allege any specific facts to support the legal conclusion that the defendant’s conduct had an adverse effect on competition in the relevant market, which is necessary to establish an antitrust violation. In addition, the court declined to base its decision on the efficient enforcer test, a test adopted by the United States Supreme Court for

analyzing standing under federal antitrust law, because neither the Supreme Court nor the Appellate Court have adopted or applied it. Nevertheless, the court ruled that, assuming the efficient enforcer test applied, the plaintiff failed to plead adequately that it is an efficient enforcer of antitrust laws. The plaintiff appeals, claiming that the alleged conspiracy is per se anticompetitive and that it sufficiently alleged an antitrust injury to the relevant market. The plaintiff further claims that if the efficient enforcer test applies, it should be deemed an efficient enforcer of antitrust laws as an unsuccessful bidder for a public contract. The defendant cross appeals, claiming that the trial court erred in denying its motion to dismiss on finding that the plaintiff had standing to bring the antitrust claim.

RALPH BIRCH *v.* COMMISSIONER OF CORRECTION, SC 20136;
SHAWN HENNING *v.* COMMISSIONER OF CORRECTION, SC 20137
Judicial District of Tolland

Habeas; Whether Habeas Court Properly Applied “Reasonable Probability” Standard of Materiality of *Brady v. Maryland*, Rather Than “Reasonable Likelihood” Standard of Materiality of *United States v. Agurs*, in Rejecting Claims That State Presented False Testimony. Ralph Birch and Shawn Henning were convicted, after separate jury trials, of felony murder for the stabbing death of a victim during a burglary, and they filed separate petitions for a writ of habeas corpus. Both claimed that their due process rights to a fair trial was violated when the state knowingly presented the false testimony of Dr. Henry Lee, the state’s chief criminologist, during their criminal trials and that the prosecution intentionally or negligently failed to rectify the false testimony. Specifically, the petitioners alleged that Dr. Lee testified that a reddish stain found on a towel seized from a bathroom in the victim’s home tested positive for blood when, in actuality, that stain was never tested by Dr. Lee or anyone else at the crime laboratory. They claimed that Dr. Lee’s false testimony allowed the prosecutor to argue that the perpetrators may have cleaned themselves before departing the scene, thereby providing an explanation for the lack of forensic evidence connecting the petitioners to the victim’s murder. In conjunction with the habeas actions, the towel was tested, and the reddish stain proved negative for blood. In *Brady v. Maryland*, 373 U.S. 83 (1963), the United States Supreme Court held that the prosecution’s suppression of evidence favorable to an accused violates due process where the evidence is “material” to guilt. Nondisclosed exculpatory evidence is considered material for purposes of

Brady only if there is a “reasonable probability” that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. Subsequently, in *United States v. Agurs*, 427 U.S. 97 (1976), the United States Supreme Court held that, where a prosecutor obtains a conviction with testimony that he or she knows or should know to be false, the false evidence is material if there is any “reasonable likelihood” that the false testimony could have affected the judgment of the jury. Here, the habeas court found that there was no evidence to support the petitioners’ contentions that Dr. Lee committed perjury and that it was much more likely that Dr. Lee mistakenly, but honestly, believed that he tested the reddish stain on the towel. Accordingly, in the absence of perjured testimony, the court applied the test of materiality set forth in *Brady* and concluded that it was not “reasonably probable” that the jury would have reached a different verdict in the absence of Dr. Lee’s erroneous testimony. These are the petitioners’ appeals from the judgments denying them habeas relief. They claim that the habeas court improperly applied the “reasonable probability” standard of materiality set forth in *Brady* based on its conclusion that Dr. Lee’s did not commit perjury. They assert that, for purposes of *Agurs*’ materiality standard, the definition of “perjured testimony” includes testimony which the prosecutor knows is false or misleading, even if the witness himself is without knowledge of its inaccuracy. They assert that because the prosecutor here had imputed knowledge that Dr. Lee’s testimony was false, the “reasonable likelihood” standard of *Agurs* was applicable to their due process claims.

RALPH BIRCH *v.* STATE OF CONNECTICUT, SC 20138;
SHAWN HENNING *v.* STATE OF CONNECTICUT, SC 20139
Judicial District of Tolland

Criminal; Petition for a New Trial; Whether Trial Court, in Adjudicating Petition for a New Trial Based on Claim of Newly Discovered DNA Evidence, Should Consider Non-DNA Evidence Regardless of Whether That Evidence is Newly Discovered. Ralph Birch and Shawn Henning were convicted, following separate jury trials, of felony murder for the stabbing death of the victim during a burglary. They filed petitions for a new trial pursuant to General Statutes § 52-270. A petitioner is entitled to a new trial under *Asherman v. State*, 202 Conn. 429 (1987), if he can establish: (1) that the proffered evidence is newly discovered, such that it could not have been discovered earlier by the exercise of due diligence; (2) that the evidence would be material on a new trial; (3) that the evidence is not merely

cumulative; and (4) that the newly discovered evidence is likely to produce a different result in a new trial. Here, the petitioners claimed that they were entitled to a new trial based solely on newly discovered DNA evidence. The DNA testing performed on evidence seized from the victim's home did not yield a DNA profile that matched either of the petitioners, but it did yield mixtures of the victim's DNA profile and the DNA profile of an unknown female. Alternatively, despite the three year statute of limitations on non-DNA evidence set forth in General Statutes § 52-582, the petitioners claimed that the trial court, when adjudicating their petitions, should consider not only the new DNA evidence, but also any non-DNA evidence that was not presented at their trials regardless of whether it was newly discovered or not. Although it concluded that the new DNA evidence satisfied the first three prongs of *Asherman*, the court denied the petitions for a new trial on finding that the fourth prong of *Asherman* was not satisfied. Specifically, the court ruled that the new DNA evidence, when combined with the original evidence from the criminal trials, would not likely result in judgments of acquittal following new trials. Alternatively, the court ruled that, even when the proffered non-DNA evidence is considered in combination with the new DNA evidence and the original criminal trial evidence, the fourth prong of *Asherman* is still not satisfied. These are the petitioners' appeals from the judgments denying their petitions for a new trial. They claim that, in resolving a petition for a new trial that is based on newly discovered DNA evidence, all non-DNA evidence, whether newly discovered or not, must be considered. The petitioners argue that, while § 52-270 is ambiguous on this point, a narrow application of the statute that ignores highly exculpatory evidence is inconsistent with the statute's fundamental goal of correcting injustices that are revealed by new evidence. The petitioners also argue that emerging case law suggests that where newly-discovered evidence exists that satisfies the first three prongs of *Asherman*, the trial court, in assessing *Asherman*'s fourth prong, should not be limited to that newly-discovered evidence, but may consider other relevant evidence that aids in the determination of what could occur in a new trial. The petitioners claim in the alternative that, if only the new DNA evidence should be considered, their petitions should still be granted because the DNA evidence, which both excludes the petitioners and implicates another, establishes that they would likely be acquitted on retrial.

NEW MILFORD BOARD OF EDUCATION *v.* NEW MILFORD
EDUCATION ASSOCIATION, SC 20140
Judicial District of Litchfield

Arbitration; Education; Labor; Whether Grievance of Teachers' Union under Collective Bargaining Agreement was Arbitrable or Subject to Resolution under Teacher Negotiation Act; Whether Arbitration of Grievance was Precluded by Collateral Estoppel or Res Judicata. The plaintiff board of education and the defendant teachers' union are parties to a collective bargaining agreement. In the fall of 2014, while the parties were negotiating a new agreement, the plaintiff gave notice to the defendant that, starting in the 2015-2016 school year, it would eliminate abbreviated school days during which teachers did non-teaching work and that such non-teaching work would be done outside of school hours. The agreement in effect provided that the parties would negotiate the impact of any alteration that the plaintiff made to the teacher work day under the Teacher Negotiation Act (TNA), which governs collective bargaining between local boards of education and teachers. The parties accordingly engaged in impact negotiations with respect to the agreement provisions pertaining to the plaintiff's proposed elimination of abbreviated school days. Because the negotiations ended in an impasse, the parties entered into last best offer interest arbitration under the TNA and submitted proposed contract language regarding the disputed issues to a tripartite panel. The panel accepted the plaintiff's last best offers, which in relevant part proposed no new language as to the teacher work day. After the tripartite panel issued its arbitration award and the successor agreement went into effect, the plaintiff implemented a calendar for the 2015-2016 school year that eliminated several abbreviated school days and required teachers to perform the non-teaching work previously performed on those days outside of school hours. The defendant then filed and sought to arbitrate a grievance alleging that the elimination of the abbreviated school days violated the agreement provisions governing the length of the teacher work day. The grievance arbitrator found in favor of the defendant. The plaintiff filed an application to vacate the grievance arbitration award, and the defendant filed a cross application to confirm the award. The trial court granted the defendant's application and denied the plaintiff's application, rejecting the plaintiff's position that the arbitrator failed to give preclusive effect to the tripartite panel's award and that the agreement did not allow for arbitration of the defendant's grievance. The plaintiff appeals from the trial court's judgment in favor of the defendant. The Supreme Court will decide whether the trial court

properly determined that the defendant's grievance was arbitrable where the plaintiff argues that, under the agreement, it had the unilateral authority to alter the teacher work day and that any resulting disputes would be resolved through impact negotiation and, if necessary, last best offer interest arbitration under the TNA. The Supreme Court will also decide whether the trial court properly declined to apply the doctrines of collateral estoppel and res judicata in confirming the arbitration award.

YUN ZHOU *v.* HAO ZHANG, SC 20146
Judicial District of Stamford

Dissolution of Marriage; Postnuptial Agreements; Whether “Special Scrutiny” Standard Applies in Determining Enforceability of Purported Revocation of Postnuptial Agreement. The parties entered into a postnuptial agreement that provided that, in the event of divorce, the plaintiff wife would receive, in addition to alimony, one third of the parties' aggregate net worth. The plaintiff subsequently brought this dissolution action and, at trial, the plaintiff sought to enforce a purported revocation of the postnuptial agreement that the parties had signed in conjunction with a failed private mediation. The trial court concluded that the enforceability of a revocation of a postnuptial agreement should be judged under the “special scrutiny” standard applicable to postnuptial agreements recognized in *Bedrick v. Bedrick*, 300 Conn. 691 (2011). In that case, the Supreme Court held that a postnuptial agreement is enforceable only if it complies with applicable contract principles and only if its terms are both fair and equitable at the time of execution and not unconscionable at the time of dissolution. Under *Bedrick*, one of the factors a court may consider in determining whether a postnuptial agreement is fair and equitable at the time of execution is whether each spouse had access to independent counsel. Here, the trial court found that the defendant had no legal representation at the time he signed the revocation agreement, noting that the defendant was unable to contact his attorney during the six day period he was given by the mediator to sign the revocation agreement. The court also found that the defendant signed the revocation agreement in reliance on the mediator's misrepresentations that all written materials prepared in connection with the mediation would remain confidential and that the defendant could withdraw from the mediation at any time without sacrificing his rights. In light of those findings, the court determined that the revocation agreement was unenforceable. Additionally, upon finding that there was no evidence

of fraud, duress, coercion, or undue influence in the execution of the postnuptial agreement, the court ruled that the agreement was enforceable. The court rendered judgment dissolving the marriage and, in accordance with the postnuptial agreement, awarded the plaintiff one third of the parties' aggregate net worth and alimony. The plaintiff appeals, claiming that the trial court improperly applied *Bedrick's* "special scrutiny" standard in determining whether the revocation agreement was enforceable. She asserts that, while it is appropriate to apply heightened scrutiny to determine the enforceability of a postnuptial agreement because such an agreement removes the issues of alimony and property division from the purview of the court, it is not appropriate to apply the same heightened scrutiny to a revocation of a postnuptial agreement, which merely leaves it to the court to decide the financial issues. The plaintiff also claims that the trial court improperly concluded that, under *Bedrick*, both parties were required to have independent counsel prior to the execution of the revocation agreement, and that the court erroneously conflated access to counsel with actual representation by counsel. Finally, the plaintiff claims that the trial court erred in enforcing the postnuptial agreement under *Bedrick* because the terms of the agreement were neither fair and equitable at the time of execution nor conscionable at the time of dissolution.

STEVEN KARAS et al. v. LIBERTY INSURANCE
CORPORATION, SC 20149

United States District Court for the District of Connecticut

Federal Certification; Insurance; Whether "Substantial Impairment of Structural Integrity" is the Applicable Standard for "Collapse" Under Homeowner's Insurance Policy; What Constitutes "Substantial Impairment of Structural Integrity" for Purposes of Applying Policy's "Collapse" Provision; Whether Terms "Foundation" and/or "Retaining wall" Unambiguously Include Basement Walls. The plaintiffs purchased a house in Vernon, and they purchased a homeowner's insurance policy from the defendant, Liberty Insurance. Several years after purchasing the house, the plaintiffs learned that cracks in the concrete basement walls of their house were caused, at least in part, by a chemical reaction leading to the deterioration of the concrete. The plaintiffs submitted a claim under their policy, and the defendant denied the claim on the ground that the plaintiffs' policy does not afford coverage for deterioration. Thereafter, the plaintiffs brought an action against the defendant in

the United States District Court for the District of Connecticut (District Court), alleging that the defendant breached the insurance contract in denying coverage. The insurance policy provides that the defendant “insure[s] for direct physical loss to covered property involving collapse of a building or any part of a building caused only by one or more of the following: . . . b. Hidden decay; . . . f. Use of defective material or methods in construction, remodeling or renovation if the collapse occurs during the course of the construction, remodeling or renovation. Loss to . . . foundation [and/or] retaining wall . . . is not included under items b. . . . and f. unless the loss is a direct result of the collapse of a building. Collapse does not include settling, cracking, shrinking, bulging or expansion.” The parties are in dispute as to whether the deterioration of the basement walls constitutes a collapse as contemplated by the insurance policy. The plaintiffs contend that the deterioration constitutes a collapse pursuant to *Beach v. Middlesex Mutual Assurance Co.*, 205 Conn. 246 (1987), where the Supreme Court held that the term “collapse” in a homeowner’s insurance policy, when undefined, is “sufficiently ambiguous to include coverage for any substantial impairment of the structural integrity of a building.” The defendant contends that the collapse provision in the policy is not ambiguous and therefore that “substantial impairment of structural integrity” is not the applicable standard here. The Supreme Court accepted the following questions of law certified by the District Court pursuant to General Statutes § 51-199b: (1) Is “substantial impairment of structural integrity” the applicable standard for “collapse” under the contract of insurance provision at issue? (2) If the answer to question one is yes, then what constitutes “substantial impairment of structural integrity” for purposes of applying the “collapse” provision of the homeowner’s insurance policy at issue? (3) Under Connecticut law, do the terms “foundation” and/or “retaining wall” in a homeowner’s insurance policy unambiguously include basement walls? If not, and if those terms are ambiguous, should extrinsic evidence as to the meaning of “foundation” and/or “retaining wall” be considered?

The summaries appearing here are not intended to represent a comprehensive statement of the facts of the case, nor an exhaustive inventory of issues raised on appeal. These summaries are prepared by the Staff Attorneys’ Office for the convenience of the bar. They in no way indicate the Supreme Court’s view of the factual or legal aspects of the appeal.

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